No. 84-1240

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

LAKE COAL COMPANY, INC. - - - Petitioner,

versus

ROBERTS & SCHAEFER COMPANY - Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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REPLY BRIEF FOR THE PETITIONER

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The list of the parent corporation and corporate subsidiaries and affiliates of the Petitioner, required by Rule 28.1, Rules of the Supreme Court of the United States, is set forth in the Petition For Writ of Certiorari, at p. ii.

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I. In Addition to its Expressed Powers, The Federal Courts, by Necessity, Have Implied Powers, Which Permit The Court to Refrain From Exercise of Jurisdiction Given Proper Circumstances.

Roberts & Schaefer Company, (hereinafter R&S), contends that a federal court having jurisdiction must exercise that jurisdiction and proceed to adjudication, absent a Congressional expression permitting the federal court to refrain from exercise of jurisdiction. Despite R&S's suggestions otherwise, its contention is not an absolute. This Court has "observed that the broad statement that a court having jurisdiction must exercise it, (see, *Cohen* v. *Virginia*, 6 Wheat 264, 404), is not universally true, but has been qualified in certain cases where the federal courts may, in their discretion, properly withhold the exercise of jurisdiction conferred upon them where there is no want of another suitable forum. Grounds justifying such a qualification have been found in considerations of convenience, efficiency and justice applicable to particular classes of cases." *Massachusetts* v. *Missouri*, 308 U. S. 1 (1939). Under these principles, this Court has recognized that a federal district

court may abstain from the exercise of jurisdiction where the order to repair to the state court would clearly serve an important countervailing interest. See, *Colorado River Water Conservation District* v. *United States,* 424 U. S. 800, 813-817 (1976), and the cases therein cited.

Absent a context of abstention, this Court has also recognized that a federal court may decline exercise of jurisdiction in deference to a parallel action pending in another federal court. *Kerotest Mfg. Co.* v. *C-O-Two Fire Equipment Co.,* 342 U. S. 180, 183 (1952). In *Landis* v. *North American Company,* 299 U. S. 248 (1936), this Court declared that the federal court's powers are not limited to those expressly granted by Congress:

> ". . . the power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants. How this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance.
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> * * *
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> We must be on our guard against depriving the processes of justice of their suppleness of adaptation to varying conditions." at pp. 255-256.

It is therefore, apparent that the federal courts' inherent powers by necessity are not as limited in scope as R&S suggests in its brief.

Moreover, this Court has recognized that the federal courts may decline exercise of jurisdiction in deference to a concurrent action pending in state court. Mr. Justice Rehnquist in *Will* v. *Calvert Fire Insurance Company,* 437 U. S. 655 (1978), stated:

> "Such an automatic exercise of authority may well have been appropriate in a day when Congress had authorized fewer claims for relief in the federal courts, so that duplicative litigation and the concomitant tension between state and federal courts could rarely result. However, as the overlap between state claims and federal claims increased, this Court soon recognized that situations would often arise where it would be appropriate to defer to the state." at p. 663.

Perhaps recognizing this increase in duplicative federal-state litigation, the Court in *Colorado River Water Conservation District* v. *United States, supra,* dismissed a federal action in deference to a concurrent state action. Mr. Justice Brennan, writing for the Court, stated:

> ". . . there are principles unrelated to considerations of proper constitutional adjudication and regard for federal-state relations which govern in situations involving the contemporaneous exercise of concurrent jurisdictions either by federal courts or by state and federal courts. These principles rest upon considerations of '[w]ise judicial administration, giving regard to the conservation of judicial resources and comprehensive disposition of litigation.' *Kerotest Mfg. Co.* v. *C-O-Two Fire Equipment Co.,* 342 U. S. 180, 183 (1952)."

Although exceptional, Mr. Justice Brennan declared that such circumstances "do nevertheless exist." Id., at p. 816.

Again, writing for the Court in *Arizona* v. *San Carlos Apache Tribe of Arizona,* ____ U. S. ____, 103 S. Ct. 3201 (1984), Mr. Justice Brennan stated:

> ". . . although the federal courts have a virtually unflagging obligation . . . to exercise the jurisdiction given them, 424 U. S. at 817, there were certain very limited circumstances outside the abstention context in which

dismissal was warranted in deference to a concurrent state court suit." at 3206.

Therefore, despite R&S's contrary contentions, it is well settled that the federal district courts, given proper circumstances, may refrain from exercise of jurisdiction in deference to a concurrent state action, as an exercise of their inherent powers.

A. MISCONSTRUED AUTHORITIES.

R&S's dependence on *Burgess* v. *Seligman,* 107 U. S. 20 (1883), *Cohens* v. *Virginia,* 19 U. S. (6 Wheat.) 264 (1821), *England* v. *Louisiana Medical Examiners,* 375 U. S. 411 (1964), and *Thermatron Products, Inc.* v. *Hermansdorfer,* 423 U. S. 336 (1976), is misplaced. We discuss their inapplication briefly.

In *Burgess* v. *Seligman, supra,* the Court held that the federal courts have a duty to interpret state statutes even in the absence of a prior state court interpretation. Therein, no concurrent state action was pending as in the case at bar.

In *Cohens* v. *Virginia, supra,* the Court held, upon a motion to dismiss for lack of jurisdiction, that where a party removes a judgment rendered against him in state court for purposes of determining whether the judgment violates the constitution, he does not bring a suit against the state so as to provide the court with jurisdiction. The question presented was whether the Court had jurisdiction, not whether it could refrain from exercise of jurisdiction.

In *England* v. *Louisiana Medical Examiners, supra,* the Court held that the federal courts have a duty to exercise and proceed with jurisdiction *where federal constitutional claims are presented.* In the case at bar there are no federal constitutional claims presented which mandate exercise of jurisdiction.

Thermatron Products, Inc. v. *Hermansdorfer, supra,* was an action to determine whether the district court could remand an action to state court for grounds other than as provided in 28 U.S.C. 1446, 1447. The question of remand has been properly disposed of in the present action and is not appealable. Moreover, there was no concurrent state action pending in *Thermatron Products, Inc.* v. *Hermansdorfer, supra,* as is present in the case at bar.

Properly viewed, the cases cited by R&S are restricted to the context in which they were presented and have no application herein. A federal court's duty to exercise jurisdiction, absent a concurrent state action or where federal constitutional claims are presented, differs dramatically when those circumstances are altered.

B. THE OBLIGATION TO EXERCISE JURISDICTION IS NOT ABSOLUTE.

The question then is not whether the federal courts have the power to refrain from exercise of jurisdiction, but whether the district court below abused its discretion in determining that exceptional circumstances exist herein which counsel against exercise of jurisdiction. It is not argued that the facts herein do not place this case within the context of the absentention doctrine. Nevertheless, the obligation to exercise jurisdiction is not unflagging, as R&S contends. The obligation is "virtually unflagging." *Colorado River Water Conservation District* v. *United States, supra.* The qualification of the obligation recognizes that exceptions exist. And in this action, exceptional circumstances do exist which, when balanced against the virtual obligation to exercise jurisdiction, counsel against that exercise.

II. Factors Which Counsel Against Exercise of Jurisdiction.

In *Colorado River Water Conservation District* v. *United States, supra,* Mr. Justice Brennan enumerated factors which a federal court could consider in assessing the appropriateness of a dismissal or stay in the event of an exercise of concurrent jurisdiction:[1]

a) the inconvenience of the federal forum;

b) the desirability of avoiding piecemeal litigation. *cf. Brillhart* v. *Excess Insurance Company,* 316 U. S. 491, 495 (1942); and,

c) the order in which jurisdiction was obtained by the concurrent forums.

In *Moses H. Cone Memorial Hospital* v. *Mercury Construction Company,* 460 U. S. 1 (1983), Mr. Justice Brennan, again writing for the Court, added two factors for consideration:

a) the forum which provides the rule of decision on the merits; and,

b) the adequacy of the state court to completely and promptly resolve the issues between the parties.[2]

In *Arizona* v. *San Carlos Apache Tribe of Arizona, supra,* Mr. Justice Brennan, again writing for the Court,

[1]Additionally, Mr. Justice Brennan stated that the court first assuming jurisdiction over property may exercise that jurisdiction to the exclusion of all other courts. at 818. However, it is not questioned that the action in the state and federal courts herein is in personum.

[2]The Court also indicated that the order in which jurisdiction was obtained should not be measured exclusively by which complaint was first filed but also in terms of how much progress has been made in the two actions.

added a final factor for consideration: convenience to the parties.

As the Court expressed in *Colorado River Water Conservation District* v. *United States, supra,* 424 U. S. at 819, "no one factor is necessarily determinative." Instead, the test requires a careful consideration by the district court of the virtual obligation to exercise jurisdiction and the combination of factors counselling against that exercise. *Landis* v. *North American Company, supra.* Contrary to the arguments of R&S, the virtual obligation to exercise jurisdiction merely underscores this Court's recognition "that a district court should exercise its discretion with this factor in mind, but it in no way undermines the conclusion of *Brillhart* that the decision whether to defer to the concurrent jurisdiction of a state court is, in the last analysis, a matter committed to the district court's discretion." *Will* v. *Calvert Fire Insurance Company, supra,* 437 U. S. at 664.[3] Clearly, such discretion is not unlimited, but must be exercised under the relevant standards prescribed by this Court. *Moses H. Cone Memorial Hospital* v. *Mercury Construction Corporation, supra.* However, although the exercise of that discretion is reviewable, it is not to be reversed absent a showing that the district court abused its discretion. *Id.*

[3]The fact that Mr. Justice Blackman in his concurring opinion in *Will* v. *Calvert Fire Insurance Company, supra,* held that the matter should be returned to the district court for its consideration under *Colorado River Water Conservation District* v. *United States, supra,* clearly demonstrates that the decision of whether to defer to the state court is necessarily left to the discretion of the district court.

III. The District Court Properly Found That Exceptional Circumstances Exist Which Counsel Against Exercise of Jurisdiction.

The district court below did not abuse its discretion in staying exercise of jurisdiction because exceptional circumstances exist which counsel against that exercise. Specifically, the district court enumerated two factors which, in its discretion, counselled against exercise of jurisdiction:

1) fairness to all parties concerned; and,

2) avoidance of multiplicity of judicial time and effort and piecemeal litigation. (J.A., at 80).

Additionally, other factors exist which, in combination, also counsel against exercise of jurisdiction:

1) state law provides the rule of decision on the merits; and,

2) the state court first obtained jurisdiction of the action.

A. AVOIDANCE OF PIECEMEAL LITIGATION.

R&S recognizes in its brief that because the federal action does not include all of the parties present in the state action, in order to obtain diversity jurisdiction, a decision in the federal court resolves only one facet of the dispute leaving the remaining issues for adjudication by the state court. Unless the federal action is stayed, piecemeal litigation will, of necessity, result.[4] Nevertheless,

[4]R&S suggests that Lake's claims against the domestic subsidiaries, omitted as parties in the federal action, are questionable. This is the same argument which R&S unsuccessfully raised in its response to Lake's motion to remand the removed action to state court. The district court found R&S's argument to be without merit and properly remanded the action. See, J. A. at 35.

R&S contends that Lake could make the domestic subsidiaries parties to the federal action and thereby avoid the piecemeal resolution of the issues which the parties presently face. Lake respectfully contends that this argument is without merit. First, Lake cannot join the domestic subsidiaries in the federal action as a matter of right, but must obtain leave of court. Fed. R. Civ. P. 14. Therefore, at this time it is uncertain whether the domestic subsidiaries can be made parties to the federal action. Secondly, Lake should not be compelled to forgo its state action against the domestic subsidiaries and litigate its claims in federal court when the state court first obtained jurisdiction of the matter and it was R&S which created the necessity for piecemeal resolution of the issues by filing a federal claim omitting necessary parties and issues in order to achieve complete diversity. R&S's argument is nothing more than an attempt to focus this Court's attention on imaginary cases in the hope that this Court will lose sight of the actual circumstances herein that piecemeal litigation is avoided by stay of the federal action.

In addition to avoiding piecemeal resolution of all the issues between all the parties, the stay of federal jurisdiction avoids duplicative judicial time and effort. Although R&S suggests that avoidance of duplicative judicial time and effort is of no consideration, in determining whether to exercise jurisdiction, this Court has indicated otherwise. See, *Colorado River Water Conservation District* v. *United States, supra,* and *Arizona* v. *San Carlos Apache Tribe of Arizona, supra.*[5] The Seventh Circuit Court of Appeals in

[5]Mr. Justice Brennan writing for the Court in *Arizona* v. *San Carlos Apache Tribe of Arizona, supra,* cited *Kerotest Mfg. Co.* v. *C-O-Two Fire Equipment Co., supra,* as authority for consideration

(Continued on next page.)

Microsoftware Computer Systems v. *Ontel Corp.*, 686 F. 2d 531 (7th Cir. 1982), a case very similar factually to the case at bar, stayed exercise of federal jurisdiction because, in combination with other factors:[6]

> ". . . there would be a grand waste of efforts by both the courts and parties in litigating the same issues regarding the same contract in two forums at once." at p. 538.

Moreover, the court therein warned that the maintenance of concurrent actions "will have a perceptable effect upon proceedings in the original action if the parties there attempt to accelerate or stall the proceedings in order to influence which court finishes first. The result would be quite similar to forum shopping and just as unseemly." *Id.*

(Continued from preceding page.)

of the factor of avoidance of piecemeal litigation. This case involved concurrent federal litigation wherein the Supreme Court approved the action of the district court in refraining from exercise of jurisdiction because it avoided duplicative judicial time and effort. Mr. Justice Rehnquist in *Will* v. *Calvert Fire Insurance Company*, 437 U. S. at 663, stated:

"Although most of our decisions discussing the propriety of stays or dismissals of duplicative actions have concerned conflicts of jurisdiction between two federal district courts, e.g., *Kerotest Mfg. Co.* v. *C-O-Two Fire Equipment Co.*, 342 U. S. 180 (1952); *Landis* v. *North American Company*, 299 U. S. 248 (1936); we have recognized the relevance of those cases in the analogous circumstances presented herein. See, *Colorado River*, 424 U. S., at 817-819."

[6]The court also held that because state law provided the rule of decision on the merits and the state court first obtained jurisdiction over the matter and was adequate to completely and promptly resolve the dispute, the federal action should be stayed pending the concurrent state action.

Similarly, Mr. Justice Brennan in *Arizona* v. *San Carlos Apache Tribe of Arizona, supra,* stated:

> ". . . concurrent federal proceedings are likely to be duplicative and wasteful. . . .
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> • • •
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> . . . the existence of such concurrent proceedings creates the serious potential for spawning an unseemly and destructive race to see which forum can resolve the same issues first—a race contrary . . . and prejudicial . . . to the possibility of reasoned decisionmaking by either forum." at p. 3214.[7]

In the present action, a determination of issues involving the design, installation and construction of the wash plant facility will be required in both the federal and state courts unless the federal action is stayed because the state action is more inclusive than the federal action in parties thereto and issues therein presented. Lake respectfully contends that the stay of the federal action not only avoids piecemeal adjudication of all of the issues and thereby conserves state and federal judicial resources, but it additionally heeds Mr. Justice Brennan's warning in *Arizona* v. *San Carlos Apache Tribe of Arizona, supra,* and avoids a "destructive race" to judgment.

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[7]R&S suggests that Lake was "quick to litigate" and "won the race to the courthouse." (R&S Brief, p. 25). The contract between the parties, which is the subject matter of this action, was breached by R&S on April 1, 1982. Thereafter, Lake gave R&S every reasonable opportunity to remedy the breach. However, after it became evident that R&S was unable or unwilling to remedy the breach and place the plant in working order, Lake exercised the only alternative available to it and filed the action in state court seven months after the breach occurred. There was no race to the courthouse.

B. STATE LAW PROVIDES THE RULE OF DECISIONS ON THE MERIT.

R&S admits in its brief that the presence of federal law is always a factor favoring retention of jurisdiction. However, it argues that its absence does not favor surrender in a diversity case. R&S's contention ignores Mr. Justice Brennan's statement in *Moses H. Cone Memorial Hospital* v. *Mercury Construction Corporation, supra,* that where state law provides the rule of decision on the merits, that factor may weigh in favor of surrender of jurisdiction, in the absence of countervailing federal policies. at 25. See also, note 29. Also, in *Colorado River Water Conservation District* v. *United States, supra,* and *Arizona* v. *San Carlos Apache Tribe of Arizona, supra,* Mr. Justice Brennan indicated that the presence of the expertise of the state court in interpreting and applying state law was a factor counselling against exercise of jurisdiction. In *Brillhart* v. *Excess Insurance Company, supra,* Mr. Justice Frankfurter, writing for the court, recognized the significance of this factor:

> "Ordinarily, it would be uneconomical as well as vexatious for a federal court to proceed in a declaratory judgment suit where another suit is pending in a state court presenting the same issues, *not governed by federal law,* by the same parties." (emphasis added). at 495.

The Seventh and Eleventh Circuits have also recognized that this factor counsels against exercise of federal jurisdiction in deference to the state forum. See, *American Manufacturer's Mutual Insurance Company* v. *Edward D. Stone, Jr.,* 743 F. 2d 1519 (11th Cir. 1984); *Microsoftware Computer Systems* v. *Ontel Corp., supra.* It is not necessary for the state law to be unsettled in order for this factor

to be significant. as R&S contends. Rather, it is apparent that it is the state court's greater familiarity and expertise with state law in all instances which counsels against exercise of jurisdiction. See, *Moses H. Cone Memorial Hospital* v. *Mercury Construction Corporation, supra,* and *Rogers* v. *Guaranty Trust Co. of New York,* 288 U. S. 123 (1933). Lake therefore, respectfully contends that this factor weighs in favor of the stay of federal jurisdiction in the case at bar.

This does not mean that in all diversity actions federal jurisdiction would be stayed in deference to a concurrent state action. In *Moses H. Cone Memorial Hospital* v. *Mercury Construction Corporation, supra,* the intent of the federal arbitration act not to delay arbitration of disputes required exercise of federal jurisdiction even though the federal action was based on diversity jurisdiction. *Tai Ping Insurance Co. LTD* v. *M/V Warschau,* 731 F. 2d 1141 (5th Cir. 1984). Where underlying federal policy requiring exercise of federal jurisdiction is present, a litigant should not be compelled to try his case in state court.[8] *England* v. *Louisiana Medical Examiners, supra.* However, in the case at bar there are no issues of federal law nor underlying federal policy which requires exercise of jurisdiction.[9] Lake respectfully contends that the fact that the state law provides the rule of decision on the merits, absent underlying federal policy requiring exercise of jurisdiction, is

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[8]In requiring a federal court to exercise jurisdiction where there are federal constitutional claims or federal policies favoring exercise of jurisdiction present or where the state court is inadequate to fairly protect the rights of the parties, the Court has already established sufficient safeguards which prevent the "domino effect" which R&S fears.

[9]Lake does not confuse diversity jurisdiction and federal question jurisdiction as R&S contends.

significant herein, and in combination with other factors present, counsels against exercise of jurisdiction.

C. PRIORITY OF FILING.

The state court obtained jurisdiction of the action six months prior to the filing of the federal action. The case has now progressed, in its natural course, so that discovery is near completion and the trial is scheduled for November 4, 1985. The chronological priority in obtaining jurisdiction and the progress of the case in the state court, in combination with the other factors present, certainly counsel against exercise of federal jurisdiction. *Colorado River Water Conservation District* v. *United States, supra; Illinois Bell Telephone Company* v. *Illinois Commerce Com'n,* 740 F. 2d 566, 570 (7th Cir. 1984); *United States* v. *Adair,* 723 F. 2d 1394 (9th Cir. 1983), cert. denied, ____ U. S. ____, 104 S. Ct. 3536 (1984).

D. FAIRNESS TO ALL PARTIES CONCERNED.

The district court's expression that a factor counselling against exercise of jurisdiction was "fairness to all parties concerned," is a hybred factor which includes the adequacy of the state court to promptly and completely adjudicate the issues and the convenience to the parties. *Moses H. Cone Memorial Hospital* v. *Mercury Construction Corporation, supra; Arizona* v. *San Carlos Apache Tribe of Arizona, supra.* R&S does not argue that these factors are not present in the case at bar nor that their existence does not counsel against exercise of jurisdiction.

Additionally, the district court's expression demonstrates that it considered whether countervailing reasons existed requiring exercise of its jurisdiction even after Lake had demonstrated the existence of exceptional circumstances which counselled against that exercise.[10] Moreover, in view of R&S's consistent thoroughness throughout this action, its failure to raise any countervailing issues requiring exercise of jurisdiction, indicates that they do not exist herein.

E. AVOIDANCE OF VEXATIOUS LITIGATION.

One additional factor appears to exist herein which also counsels against jurisdiction: that the federal action is no more than a defensive tactical maneuver instituted by R&S for vexing and harassing Lake. R&S admits in its brief that the actions between the parties have been the equivalent of the Hatfield-McCoy feud. (R&S Brief, at p. 9). In *Calvert Fire Insurance Company* v. *American Mutual Reinsurance Company,* 600 F. 2d 1228, 1234 (7th Cir. 1979), the court held: "preventing a vexatious suit is similar to the interest in avoiding piecemeal litigation mentioned in *Colorado River, supra,* at 818, and would clearly justify federal deferral to the parallel state proceedings. . . ."

IV. The Sixth Circuit Opinion.

R&S suggests that the Court of Appeals' judgment, reversing the district court's stay of exercise of jurisdiction, was "totally sound." Lake respectfully contends that the Court of Appeals failed to recognize the presence of the exceptional circumstances in the within action which the district court properly held counsel against the exer-

[10]Although R&S has raised in passing the issue of prejudice in the state court, there is no indication whatsoever that R&S will be subject to any prejudice in the state court. (J. A., at 99). In fact, R&S did not even raise the issue of possible prejudice in the district court nor in the Court of Appeals, but for its motion for summary reversal which was denied by the Sixth Circuit. (J. A. at 102).

cise of jurisdiction. Its judgment is therefore error and requires reversal by this Court. Moreover, the appellate court's stay of its mandate indicates that it, too, in retrospect, questioned the "soundness" of its decision.

CONCLUSION

For the foregoing reasons and for those stated in its brief, the Petitioner respectfully requests that this Court reverse the judgment of the Sixth Circuit Court of Appeals and that the district court's order of stay be reinstated.

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